UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

HUBER SPECIALTY HYDRATES, LLC,	)	
	)	
Respondent,	)	
	)	
And	)	Case 15-CA-168733
	)	
	)	
UNITED STEELWORKERS, LOCAL 4880,	)	
	)	
Charging Party	)	
	)	Cases 15-CA-177324
And	)	15-CA-179549
	)	
	)	
BRANDON HARMON,	)	
	)	
An Individual	)	

RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

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NOW COMES Huber Specialty Hydrates, LLC, Respondent herein, and files its Brief in Support of Exceptions to Administrative Law Judge's Decision as follows:

STATEMENT OF CASE

United Steelworkers, Local 4880 (Union) filed the initial charge in this case on February 1, 2016, alleging that Respondent had violated §8(a)(5) of the Act by unilaterally implementing a modified attendance policy. (GC Exh. 1(a)). Subsequent charges were filed by Brandon Harmon, an individual, alleging that Respondent violated §§ 8(a)(1) and (3) of the Act by allegedly threatening him and thereafter issuing him a written warning for engaging in protected concerted activities. (GC Exhs. 1(g), 1(k). The Regional Director issued a complaint on May 31, 2016, and a consolidated complaint on September 29, 2016. (GC Exhs. 1(e), 1(m)). Respondent filed timely answers denying the material allegations of the complaints and raising certain affirmative defenses.[1] This case was heard on April 6 and 7, 2017, in Little Rock, Arkansas, before Administrative Law Judge Christine Dibble. On January 29, 2018, Judge Dibble issued her recommended decision. Judge Dibble recommended that the 8(a)(1) and (3) allegations pertaining to Brandon Harmon be dismissed, but that the Board find a violation of §§ 8(a)(5) and (1) of the Act based on Respondent's asserted refusal to bargain with the Union over changes to Respondent's attendance policy. Respondent now files its exceptions to said decision, insofar as it concerns Respondent's attendance policy, and this supporting brief.

STATEMENT OF FACTS

A. Background

The Bauxite, Arkansas facility was originally owned and operated as a bauxite refinery by Alcoa Corporation. In 1996, because of the cost involved in mining the bauxite ore, Alcoa

[1] Respondent's answers were inadvertently omitted from the formal papers, but were added by motion as GC Exhs. 1(s) and 1(t). (JD 2, n. 2).

ceased its bauxite refinery operations and became a specialty alumina producer. The business struggled, and the employee complement declined from roughly 1600 employees to 400 employees. In 2004, Alcoa sold the business to Almatis. Throughout this time period, dating back at least to 1973, the Union has represented the production and maintenance employees at the facility. In April 2012, Respondent, who was one of Almatis's customers, acquired a part of Almatis's Bauxite operations. Almatis continued to operate a separate part of the facility. Respondent produces a very fine (one micron) alumina trihydrate material, which has flame retardant characteristics and is used in the paper and wiring industries. When Respondent acquired the specialty hydrates part of the facility in April 2012, what previously had been a single bargaining unit became two bargaining units. Approximately 50 employees of Respondent are in the bargaining unit. A separate collective bargaining agreement was negotiated for the employees acquired by Respondent, although this agreement substantially mirrored the Almatis contract. Albany Bailey, an employee of Respondent, has at all material times been the President of the Union and has responsibilities for both units. (Tr. 22-23, 72-73, 173-180, Resp. Exh. 5).

B. The Initial Attendance Policy

The attendance policy in place prior to February 2016 was one that essentially had been in place when Huber acquired the operations from Almatis. (Jt. Exh. 2). It is an "occurrence" policy, which provides employees with a specified number of "occurrences" (absences/tardies) that are permitted before a schedule of progressive discipline begins. With the exception of certain absences that are deemed "non-chargeable" (e.g., holidays, vacations, leaves of absence), all absences, regardless of reason, are deemed chargeable. Each full-day absence counted as one occurrence, except that multiple-day absences related to the same condition only resulted in a single occurrence, provided the absences were medically certified. Tardies and leave earlies resulted in ½ occurrence. The policy included a progressive discipline track based on a rolling

12-month period, whereby an employee would be issued a verbal warning after 5 occurrences, a written warning after 6 occurrences, a one-day unpaid suspension after 8 occurrences, a three-day unpaid suspension after 10 occurrences, and would be discharged upon reaching 12 occurrences. Because an occurrence would "roll off" after 12 months, employees could move up and down the disciplinary track.

The policy also contained a "Call-Off Procedure," which required employees to "provide as much advance notice as possible to their immediate Supervisor in order to allow sufficient time to provide proper coverage." A separate disciplinary track applied for violations of the call-off procedure. Specifically, the first violation resulted in a written warning, the second resulted in a one-day unpaid suspension, the third resulted in a three-day unpaid suspension, and the fourth resulted in termination. As with the occurrence policy, warnings rolled off after 12 months.

C. 2015 Negotiations and Agreement

In early 2015, Respondent and the Union engaged in negotiations for a new collective bargaining agreement. During these negotiations, the Union made two proposals regarding the existing attendance policy. The first of these proposals was to modify the policy's provisions regarding tardiness such that an employee who was tardy for less than one hour would only be charged ¼ occurrence. Under the existing policy at the time, an employee who was tardy for less than one hour would be charged ½ occurrence. The second Union proposal was to include the attendance policy as part of the collective bargaining agreement. (Resp. Exh. 1). The Union's stated purpose in proposing to include the attendance policy in the CBA was to prevent Respondent from being able to change the policy during the term of the CBA. Respondent rejected both proposals, and the Union subsequently withdrew them. (Tr. 74-77, 183-185, 299).

The management rights clause (Article 4.01) was also a topic of discussion during the 2015 negotiations. The existing article provided:

> Except as may be limited by the provisions of this Agreement, the operation of the plant, and the direction of the working forces, including the right to hire, lay off, suspend, dismiss and discharge any employee for proper and just cause and to assign employees to tasks as needed are vested exclusively with the Company. This includes the right to adopt reasonable rules and policies subject to at least seven (7) days' notice prior to implementation of such rule or policy to provide the Union with the opportunity for input during that time and subject to the Union's right to promptly grieve the reasonableness of any such rule or policy. However, as the parties have a joint interest in and obligation for workplace safety, drug and alcohol testing will be performed pursuant to the agreed upon policy. *The Company will offer employees a last chance agreement in lieu of termination on one occasion unless the employee was in fact impaired on the job. The Company will continue to apply the existing Employee Policy Book.*

(Resp. Exh. 2; Resp. Exh. 5, p. 7) (Emphasis Supplied).

During the 2015 negotiations, Respondent proposed to delete the final two (italicized) sentences in this article. After discussion, the parties agreed to delete the last sentence, but not the preceding sentence regarding last chance agreements. (Jt. Exh. 1, p. 4). Thus, the 2015 CBA no longer required that the Company "continue to apply the existing Employee Policy Book." (Tr. 77-79, 185-186

The 2015 CBA contains other provisions relevant to this case. Article VII (Jt. Exh. 1, p. 8) recognizes Respondent's right to discipline employees for cause, and the "employee's right to grieve the discipline and to have Union representation." Article X (Jt. Exh. 1, pp. 15-17) addresses "Hours of Work." Subsection 1 (d) provides:

> Consistent with business needs, the Company will have the right to adopt and modify from time to time shift starting and ending times, starting and quitting times for individual employees, and meal and break periods.

D. The Parties' Application Of Article 4.01

Respondent has consistently interpreted Article 4.01 as authorizing it to adopt new rules and policies and to modify existing rules and policies, provided that it gives the Union at least seven days' notice and an opportunity to provide input, and provided further that the new or revised rule or policy does not conflict with the CBA. If the Union contends that the rule or policy is unreasonable, its recourse is to promptly grieve the reasonableness of the rule or policy. In accordance with this interpretation of Article 4.01, Respondent followed this procedure in modifying an existing cell phone policy and an existing safety shoe policy, and in adopting a new tobacco policy. (Tr. 79-80). Albany Bailey agreed that Respondent had the right to implement these revised policies because they were "reasonable." (Tr. 80).

E. Revising The Attendance Policy

In the latter part of 2015, as a result of increasing attendance issues, Respondent began contemplating modifications to the attendance policy. The policy went through a few internal revisions, at which time it was presented to the Union at the December 17, 2015 central committee meeting, which is a monthly labor-management meeting in which Respondent and the Union discuss any outstanding issues. (Jt. Exhs. 3, 4, 5). Human Resource Manager Jessica Rowan reviewed the draft policy with the Union and pointed out the major changes from the existing policy. These changes included the following:

1. Adding provisions (a) requiring employees to clock in no more than 30 minutes before their shift and to clock out no more than 14 minutes after the end of their shift; (b) authorizing discipline for working unapproved overtime; (c) requiring employees to wait for relief to arrive before leaving their work area at the end of the shift, unless the supervisor was notified;

2. Adding a provision requiring employees to personally contact their supervisor, or manager, if they were going to be absent;

3. Modifying the disciplinary track for "No Calls/ No Shows" from four steps to three steps, but adding a provision permitting management to "consider extenuating circumstances" when determining discipline;

4. Specifying that once overtime was accepted, the employee's failure to work the overtime would result in an occurrence (existing policy allowed employee to change mind provided one hour advance notice given);

5. Modifying the disciplinary track for occurrences from five steps to four steps (eliminating 3-day suspension);

6. Reducing the number of occurrences for discharge from 12 to 8;

7. Permitting management to discharge "habitual offenders" even if they did not reach 8 points;

8. Requiring employees to furnish a Return to Work statement before returning to work "after an absence for 3 or more days due to an illness or injury."

The Union raised a number of concerns during the December 17 meeting, including concerns regarding removal of the 3-day suspension level, the reduction in the number of occurrences required for each step of discipline, the changes in the call-off procedure, and the provision regarding "extenuating circumstances." During the meeting, the Union acknowledged that the Company had the right to implement, subject to the 7-day notice period and the Union's right to grieve the reasonableness of the policy. (Tr. 64). The meeting ended with the understanding that the Union would get back to Respondent with any additional input. The stated

implementation date at that time was January 1, 2016. (Tr. 32-34, 45-53, 91-92, 103-106, 262-264).

Because of the nature of the proposed changes to the policy, Respondent anticipated that the Union would respond promptly with additional feedback. In fact, however, the Union did not respond at all during the final two weeks of 2016, and because of the intervening holidays, Respondent did not push the issue. Instead, it chose to delay the implementation date. (Tr. 263-264). Upon her return from the holidays, on January 4, 2016, Rowan sent Albany Bailey the following email:

> We haven't heard anything from the union regarding the attendance policy. Do you have any questions/issues (besides the adjustment on current occurrences to the new policy)? Thank you.

Bailey responded by email on the morning of January 5, 2016, as follows:

> We have a few concerns and suggestions. We plan to have them appropriately bargained and/or grieved if necessary.

(Jt. Exh. 6(a)).

Shortly after sending his response to Rowan, Bailey sent a second email to Rowan (and other managers) bearing the subject heading "Cease and desist/attendance policy:"

> On the behalf of the members of United Steelworkers Local 4880 currently employed by Huber Specialty Hydrates LLC, and whereas attendance policies along with any changes in working conditions are mandatory subjects of bargaining, we hereby request that a unilateral implementation of such policies are ceased and that you desist from such actions until after those items have been appropriately bargained.
>
> Please contact our Staff Representative, Michael Martin, to schedule a suitable date, time, and place for discussion of all issues involved with policies, process disputes, and causes for this and other cordial demands.

(Jt. Exh. 6(b), p. 3).

After discussing the issue with Respondent's outside labor counsel, (Tr. 265), Rowan responded to Bailey on January 13, 2016 as follows:

> As you recall management met with you on 12/17/15 for a Central Committee meeting. Following the provisions on Article IV Section 1, the Company notified you of our intent to implement a revised attendance policy. We gave you more than the required 7 days stated in the contract. It's now been 15 days [2] without receiving any specific input from the union. We plan to implement effective 2/1/15 [3] with communication going to all employees prior to this date. If you'd like to give us any input prior to that date, we would be glad to consider it.

Less than 30 minutes later, Bailey responded as follows

> As you recall, in the Central committee meeting, there were several issues/concerns and specifics. Those issues were reiterated to Frank Viguerie by Brian Christian at building 450 during the pannevis extention [sic] installation. Also two provisions of your implementation as we understand them are not legal. The Attendance Policy will be bargained. If you choose not to bargain, we will take appropriate action to correct your unreasonable behaviors. After consulting with the employees, you received notice of cease and desist on January 5th to bargain all issues associated with the proposed attendance policy. It also prompted you to contact our International representative. Please do so immediately. Nothing in the contract precludes you from mandatory bargaining.

(Jt. Exh. 6(b), p. 2).

Rowan and Bailey briefly discussed the issue on the afternoon of January 13, and Rowan agreed to respond yet again, which she did the following afternoon, January 14, 2016:

> As we discussed, the management rights clause is a clear and unmistakable waiver of the company's obligation to bargain over adopting policies. It provides a specific process for providing the union with a week of time to provide any input and the right after implementation to grieve. Without precedent, we will gladly give the union another week (by 01.21.16) to provide any concerns or input they have for management to consider prior to its implementation. Thereafter,

[2] It is not clear where the reference to "15 days" came from, as it had been 27 days since the December 17 meeting.

[3] This obviously should have been 2/1/16.

> we will communicate the revised attendance policy with all employees the following week (01.25.16 to 01.29.16). The policy will then become effective 2.01.16.

This triggered the following response from Bailey, also on January 14:

> Thank you for your brief investigation and follow-up of the legalities involving our meeting. However, we simply did not discuss any "waiver" of the legal obligations concerning the implementation of your rough draft of attendance policy changes. In fact our agreement is far from the clear and concise definition that you have embarked upon in determining the right to bargain any changes in our working conditions. Please look under Article XXIV. Legal rights where it states "Nothing herein shall deprive either party or any employee of any rights or protection granted under any applicable federal or state law." Our contractual agreements do not superseded [sic] the law. That being said we welcome the opportunity for input and reserve our right to bargain any changes subject to the protections under the NLRA, FMLA, and all applications of federal and state law. Our International representative has agreed to bargain on the 28th of this month. If the input we have for you is not an agreeable standard, our obligations are to bargain the changes that you have presented. Again we request and reaffirm that Huber Specialty Hydrates, LLC cease any unilateral change and desist from implementation until bargaining has reached completion.

(Jt. Exh. 6(b), p. 1).

On January 14, 2016, the Union filed a grievance alleging that Respondent was violating Article VII, Section 3 of the CBA[4] as follows:

> The company intends to alter the attendance policy plantwide due to a perceived attendance problem with a small percentage of hourly employees. This is blanket discipline.

The Union requested the following remedy:

> No changes are to be made to the existing attendance policy without explicit agreement between the union and the company.

(Jt. Exh. 7).

[4] This article requires "just cause" for discipline.

Another central committee meeting was conducted on January 20, 2016. The attendance policy was discussed again at this meeting. (GC Exh 2, Tr. 38-39). On January 28, 2016, [5] following a third step grievance meeting, Bailey and Rowan had a discussion in Rowan's office. Using a printed copy of the proposed draft policy, Rowan made handwritten notes regarding points and objections made by Bailey. She also made internal notes regarding management concerns and issues. (Resp. Exh. 12). With respect to the proposed language stating that once an employee accepted an overtime assignment, the employee could not thereafter call off without receiving an occurrence, Bailey expressed the Union's view that this adversely affected the 8-hour employees more than 12-hour employees. Bailey also raised objections to the revised discipline schedule, both with the removal of the three-day suspension and with the reduction in the number of occurrences that would trigger various disciplinary steps. Bailey suggested that another level be added and that the number of occurrences for discharge be increased from 8 to 10. This would have resulted in the following disciplinary track: Verbal warning at 3 occurrences, written warning at 5 occurrences, one day unpaid suspension at 7 occurrences, three-day disciplinary suspension at 9 occurrences, and discharge at 10 occurrences. The Union also raised concerns regarding the proposed Return to Work provision. Finally, the Union proposed that all employees have their attendance records cleared and that they start anew with no occurrences. (Tr. 41-42, 67-68, 266-273).

Following Rowan's meeting with Bailey, Respondent revised the draft policy to address some of the Union's concerns as well as issues that management itself had identified. The most significant change from the draft policy was a revision to the disciplinary track such that a verbal

[5] Brian Christian testified regarding a grievance meeting on January 22, 2016, at which the policy was also discussed. (Tr. 108-109). It is not clear whether this is the same meeting that occurred on January 28.

warning would be issued at 3 occurrences, a written warning would be issued at 5 occurrences, a one-day unpaid suspension would be issued at 7 occurrences, and termination would occur at 9 occurrences. (Jt. Exh. 9). On January 29, 2016, Rowan issued a memorandum to all employees stating that the revised attendance policy, which was attached, would be implemented effective February 1, 2016. Rowan noted that feedback from the Union had been considered. She further stated that "[t]o ensure that employees have a fair opportunity to improve their attendance before experiencing discipline under the revised Attendance Policy, each employee will be credited three and one-half occurrences starting with the most recent occurrences." (Jt. Exh. 8).

STATEMENT OF ISSUES

1. Whether the complaint should be dismissed because Respondent fully complied with the procedure set forth in the CBA for implementing new or revised rules and policies? [Exceptions 1, 2, 3, 5, 11, 12, 13, 14, 15, 16].

2. Whether, under a waiver analysis, the Union clearly and unmistakably waived any right to bargain over the changes to Respondent's attendance policy? [Exceptions 2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16].

3. Whether, under a contract coverage analysis, the Union fully exercised its right to bargain, and Respondent had no further bargaining obligation? [Exceptions 2, 4, 5, 11, 12, 13, 14, 15, 16].

ARGUMENT

A. The Parties Negotiated A Specific Procedure For Implementing Rules of Conduct, and Respondent Fully Complied With That Procedure Before Implementing A Revised Attendance Policy. [6]

Although the Board historically has applied a "clear and unmistakable waiver" analysis in cases where an employer claims a contractual right to act, it has applied a distinct variant of this analysis where the contract sets forth a specific bilateral procedure for adopting and implementing new or revised rules. While this analysis bears some similarity to the waiver analysis historically applied by the Board, it focuses more explicitly on the *procedural* requirements that the employer must satisfy before acting. This seems natural inasmuch as in cases of this nature, the employer's right to act is conditional rather than absolute. Respondent contends that this line of cases is controlling here, and that the ALJ erred in distinguishing these cases.

In *Howard Industries, Inc.*, 365 NLRB No. 4 (2016), where the complaint alleged that the respondent unilaterally changed its policy regarding gifts, the Board found that no violation occurred "because Respondent implemented the policy change after following the procedure set forth in the collective-bargaining agreement regarding proposing, negotiating and implementing new or modified policies." *Slip op.* at p. 1. There, the agreement provided that the employer would notify the union by email if it wished "to change an existing policy, create a new policy,

[6] Although not relevant to the legal analysis, the judge erroneously found that Respondent did not respond to the January 14 grievance filed by the Union regarding the attendance policy. (JD 6: 40-41). While Brian Christian testified that he never received a first-step response (Tr. 93), both he and Albany Bailey testified to numerous discussions with management regarding the attendance policy during various grievance meetings. Grievances were often grouped together for discussion purposes. (Tr. 40-42, 60-71, 94-96, 107-112). Respondent clearly responded to the Union's grievance. In any event, the Union opted to pursue its charge before the Board, rather than its grievance.

or modify job performance standards" and the union would have ten calendar days to request bargaining. If the union failed to give timely notice, "the Company may implement the change and the Union waives any arbitration or other legal remedies concerning the creation or modification of the policy."[7] However, if the union made a timely request to bargain, bargaining would commence within ten calendar days and conclude no later than seven calendar days after the first session. "If the parties fail to reach agreement by the end of the time period set above, the Company may implement the new policy or policy change" and "the Union will have the right to grieve the reasonableness of the policy under the grievance procedure." *Slip op.* at p. 2. Pursuant to this provision of the agreement, the employer gave the union advance notice of the change in gift policy on November 6, but the union failed to respond in a timely fashion, and the employer implemented the policy on November 17. On November 19, the union requested bargaining, but the employer declined, citing the union's failure to make a timely request. In analyzing the issue, the ALJ, with Board approval, noted that although it would normally be necessary to assess whether "the union clearly and unmistakably waived its right to bargain," "[t]his case is different, primarily because in Section 1 of Article XXI of the collective-bargaining agreement, the parties created and agreed to a specific procedure that applies when Respondent wishes to change an existing policy, create a new policy, or modify job performance standards." *Slip op.* at p. 4. Thus, the ALJ concluded that "t]he issue in this case, then, is whether Respondent's decision to implement its Company Gifts to Employees policy on November 17,

[7] The express waiver language in this provision was limited to waiving the right to pursue arbitration or other legal remedies if the union failed to request bargaining in a timely fashion. There was no contention that this language constituted a waiver of the union's right to bargain. As explained below, the Board's conclusion that the employer lawfully implemented a revised gift policy was not based on any finding that the contract *waived* the union's right to bargain. Rather, it was based on the employer's compliance with the contractually established procedure.

2015, is protected by the collective-bargaining agreement." *Slip op.* at p. 4. Because the company complied with the procedure set forth in the agreement, the ALJ concluded that its actions were legally privileged, and the Board agreed.

The judge concluded that *Howard Industries* was "inapposite because the employer relied on language in a specific provision in the CBA that dealt with policy changes to support its position that its unilateral change of a company policy was not a violation," (JD 13: 44-46); whereas, "[i]n the matter at hand the management-rights clause is the focus of the issue and not a specific provision of the CBA which addresses attendance issues." (JD 14: 2-4). This is a distinction without a difference, and Respondent is unaware of any supporting legal precedent. Indeed, in *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007), a case cited by the judge, the Board relied upon three clauses buried in a 25-clause management rights article to find that the employer lawfully implemented changes to its attendance and tardiness policy. *Id.* at 808-809.

Under the judge's analysis, a contractual provision that the parties choose to include in a broader management rights article is entitled to less weight than would be the case if the parties had placed the identical language in an article unto itself. This simply cannot be. The contractual language itself, not its location in the contract or the label attached to the article, is what is significant. Notably, the pertinent contractual provision in *Howard Industries* was general in nature and did not specifically address changes to the gift policy. Thus, the language in question applied to any change in any policy. The same is true here, as the CBA authorized Respondent to adopt and implement reasonable rules and policies of any kind, subject to compliance with a specific procedure and subject to the Union's right to grieve the reasonableness of the rule or policy.

The judge also distinguished *Howard Industries* on the ground that "Respondent in this case acknowledged that the attendance policy was not part of the CBA" and that Respondent rejected the Union's proposal to place the attendance policy in the CBA. (JD 14: 4-11). It is not at all clear how these facts support the judge's findings. If the attendance policy had been included in the CBA, Section 8(d) of the Act would have precluded Respondent from making any mid-term modification to the attendance policy without the Union's express consent. It is only because the policy existed outside the CBA that management could rely upon its right to adopt reasonable rules and policies if it followed the contractual procedure. Indeed, in *Howard Industries*, the gift policy was not included within the contract, but instead was a policy that the employer had implemented.

Contrary to the judge's findings, *Howard Industries* is directly applicable in this case. A similar analysis was applied by the Board in *Ingham Regional Medical Center.* 342 NLRB 1259 (2004). The issue there concerned whether the employer unlawfully unilaterally subcontracted bargaining unit work and laid off employees. The collective bargaining agreement authorized the employer to subcontract, provided it gave the union 60 days' advance notice and an opportunity "to first discuss the decision and impact." The employer provided the requisite notice and engaged in discussion with the union, after which, it implemented its proposal. In these circumstances, the ALJ, with Board approval, found that "Respondent fulfilled the procedural and discussion requirements spelled out in the parties' collective-bargaining agreement, and that it had no duty to bargain over the decision to subcontract the coders' work." *Id.* at 1262. [8]

[8] It is true, as the judge notes, that the Board in *Ingham* purported to apply the clear and unmistakable waiver standard. However, in applying this standard, the Board focused on the employer's compliance with the procedural steps established in the contract. One might just as well characterize this as an application of the contract coverage doctrine. It is the analysis, not the label attached, which is significant.

Howard Industries and *Ingham* control this case. Here, the CBA granted Respondent "the right to adopt reasonable rules and policies subject to at least seven (7) days' notice prior to implementation of such rule or policy to provide the Union with the opportunity for input during that time and subject to the Union's right to promptly grieve the reasonableness of any such rule or policy." Union President Bailey acknowledged the Company's right to implement, subject to giving the required notice and the Union's right to grieve the reasonableness of the policy. Thus, the question is not so much whether the Union "waived" the right to bargain as it is whether Respondent provided the Union with at least seven days advance notice and an "opportunity for input" prior to implementation. The answer to this question is clearly "yes." On December 17, 2015, Respondent provided the Union with a copy of the proposed new attendance policy, and advised the Union that it intended to implement on January 1, 2016. Some discussion occurred during this meeting regarding specific Union concerns, and the Union indicated that it would be back in touch. In fact, however, the Union did not respond at all before the end of the calendar year. In these circumstances, Respondent would have been within its rights to have implemented the policy on January 1, 2016. Nevertheless, because Respondent truly desired to receive the Union's input, it delayed implementation until February 1, 2016. During the month of January, some discussion continued at the January 20, 2016 central committee meeting, as well as on January 28, 2016, following a grievance meeting. Rowan took notes of the concerns, and Respondent made some changes to the policy based on the Union's input before implementing the policy on February 1, 2016. Because the parties negotiated a specific procedure to be followed for implementing rules and policies, and Respondent complied with those procedures, it did not violate the Act by implementing a new attendance policy on February 1, 2016.

B. The Union Clearly and Unmistakably Waived Any Right to Bargain.

Even if the Board applies its traditional waiver analysis, the result is the same. Although a waiver of bargaining rights must be "clear and unmistakable," no specific type of evidence is required, and the waiver need only be established by a preponderance of the evidence. Typically, a waiver is established through specific contract language, course of conduct, or both. The Board's decision in *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007) is highly instructive. There, the issues concerned the employer's implementation of two policies: (1) a staff incentive pay policy and (2) a revised attendance policy. The employer admitted its refusal to bargain, but raised certain defenses. With respect to the incentive pay policy, the employer acknowledged that the collective bargaining agreement did not expressly address incentive pay, but contended that the union historically had acquiesced in the employer's unilateral implementation of incentives. The Board rejected this defense as inadequate to establish a clear and unmistakable waiver of the right to bargain. With respect to the attendance policy, however, the employer relied upon specific language in the management rights clause, which it contended gave it the right to act unilaterally. The Board agreed:

> Application of our traditional standard reveals that several provisions of the management-rights clause, taken together, explicitly authorized the Respondent's unilateral action. Specifically, the clause provides that the Respondent has the right to "change reporting practices and procedures and/or to introduce new or improved ones," "to make and enforce rules of conduct," and "to suspend, discipline, and discharge employees." By agreeing to this combination of provisions, the Union relinquished its right to demand bargaining over the implementation of a policy prescribing attendance requirements and the consequences for failing to adhere to those requirements.

Id. at 815.

The combination of provisions in the CBA between Respondent and the Union are substantially similar to those in *Provena*. Thus, whereas the agreement in *Provena* authorized the

employer to "change reporting practices and procedures," the CBA here authorizes Respondent to "adopt and modify from time to time shift starting and ending times, starting and quitting times for individual employees, and meal and break periods." Whereas the agreement in *Provena* granted the employer the right "to make and enforce rules of conduct," the CBA here gives Respondent the right "to adopt reasonable rules and policies." Whereas the agreement in *Provena* authorized the employer "to suspend, discipline, and discharge employees," the CBA here authorizes Respondent "to suspend, dismiss and discharge any employee for proper and just cause" and to discipline employees for cause. There really are no material differences in the language of these contracts that would warrant a different result here than in *Provena.*

The judge's suggestion that Respondent admitted in correspondence with the Union that it was relying only on the management rights clause and that this precluded Respondent from raising other contractual provisions during litigation (JD 15: 8-10) is patently without merit. The email cited by the judge (Jt. Exh. 6(b)) does refer only to the management rights clause, but nowhere in the email is there any "clear and unmistakable" waiver of the right to rely upon other contractual provisions should the matter later proceed to litigation. Moreover, even if Respondent had been entirely ignorant of its contractual rights at the time it refused to bargain, if in fact the contract authorized it to take certain action, its initial ignorance would not cause it to lose a clear contractual right. Waiver would only occur if it failed to raise the defense at an appropriate time during the litigation process. Here, Respondent asserted these additional contractual provisions at the earliest possible time during the litigation, i.e., in its posthearing brief to the judge.

The differences in contract language that do exist between the instant case and *Provena* bolster, rather than weaken, the Union's waiver of rights. Thus, unlike *Provena,* the CBA here

provides for a specific procedure to be followed when rules or policies are modified or implemented. Respondent is to give seven days advance notice and an opportunity for input, after which time Respondent may implement and the Union may grieve the reasonableness of the rule or policy. Having expressly agreed to a specific procedure under which it had an opportunity to discuss and provide input, but not "bargain," which procedure was clearly followed, the Union cannot be heard to claim that it possessed bargaining rights in excess of those granted by the CBA.

The parties' bargaining history further confirms the Union's waiver. In evaluating bargaining history, the Board considers whether the matter at issue was fully discussed and whether the union "consciously yielded or clearly and unmistakably waived its interest in the matter." *Johnson-Bateman Co.*, 295 NLRB 180, 185 (1989). Here, the Union clearly recognized during the 2015 negotiations that the attendance policy was subject to modification by Respondent. Thus, it made a specific proposal to incorporate the attendance policy into the CBA. The effect of such a proposal, if accepted, would have been to give the policy the force of contract and preclude Respondent from modifying it during the life of the agreement. Respondent rejected the Union's proposal precisely for that reason, and the Union "consciously yielded" on the issue when it withdrew its proposal. The Union also agreed during the 2015 negotiations to delete language from Article 4.01 requiring the Respondent to continue the existing policy manual. This language was included at the time Respondent acquired the operations from Almatis. Although Respondent may have indicated that it was not contemplating any policy changes at the time, that did not mean that changes would not occur in the future.

Union President Bailey's testimony confirms as much. Thus, on cross examination, he acknowledged that Respondent has "the right to implement reasonable policy subject to the

grievance procedure" and that the Union acknowledged this to be true in the December 17, 2015 central committee meeting. (Tr. 64-65). The Union, however, did not believe that the changes to the policy were "reasonable." The reasonableness of the policy, of course, is an issue for an arbitrator, not the Board.

The Board's decision in *Graymont PA, Inc.*, 364 NLRB No. 37 (2016), cited by the judge, warrants some discussion. In *Graymont,* the management rights clause gave the employer the right "to direct its employees; . . . to evaluate performance, . . . to discipline and discharge for just cause, to adopt and enforce rules and regulations and policies and procedures; [and] to set and establish standards of performance for employees." The Board majority found that this language was not sufficiently specific to waive the union's right to bargain over revisions to the attendance policy, work rules, and progressive discipline. Respondent contends that *Graymont* was wrongly decided, but in any event, it is distinguishable from the case at bar. First, as noted above, unlike *Graymont,* the CBA between Respondent and the Union does reference attendance and gives Respondent the right to "adopt and modify from time to time shift starting and ending times, starting and quitting times for individual employees, and meal and break periods." Second, unlike *Graymont,* the attendance policy was specifically addressed during the 2015 negotiations and the Union consciously withdrew its proposal to incorporate the attendance policy into the CBA. The parties also agreed to delete language referencing the old Almatis policy book. Third, unlike *Graymont,* there is record evidence of other changes by Respondent to rules and policies, as well as testimony from the Union that it understood that Respondent had a right to implement reasonable rules and policies.

Another critical distinction here is that the parties agreed to a very specific and detailed procedure for addressing new rules and policies. This procedure included advance notification to

the Union, an opportunity to provide input, and the right to grieve the reasonableness of the rule or policy following implementation. Given the specificity of this procedure, it would make no sense whatsoever to require that the parties identify every type of rule or policy that might be adopted. That is why, as discussed above, the Board applies a somewhat different analysis in cases of this nature and the focus is directed at whether the employer complied with the agreed-upon procedure. Thus, in *Howard Industries, supra,* the Board found that the employer lawfully implemented a new policy regarding employee gifts even though the contract did not make any mention of employee gifts, nor did it specify the types of rules and policies that the employer could implement. Rather, the contract established a specific all-encompassing procedure for addressing new and revised policies, which the employer followed. The same result follows here. Respondent requests that the allegation regarding Respondent's implementation of a revised attendance policy be dismissed.

C. The Contract Covered The Dispute, and The Union Fully Exercised Its Bargaining Rights.

Although the Board historically has applied the clear and unmistakable waiver standard in cases of this nature, a separate doctrine known as the "contract coverage" analysis has been applied by some courts. Over the years, some Board members have urged the Board to adopt this same analysis. While it is not necessary for the Board to resolve this debate in order to decide this case, there are valid reasons for adopting the contract coverage analysis. If the Board were to do so, the outcome would be the same, and the complaint should be dismissed.

Where the parties have negotiated a collective bargaining agreement that addresses how a particular subject—employee hours—will be handled, the Union's bargaining rights regarding that subject have been fully exercised for the life of the agreement, and the clear and unmistakable waiver standard has no application. *NLRB v. United States Postal Service,* 8 F.3d

832, 833-834, 836 (D.C. Cir. 1993). "Unless the parties agree otherwise, there is no continuous duty to bargain during the term of an agreement with respect to a matter covered by the contract." *Id.* at 836.

The Supreme Court's decision in *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693 (1983),[9] a case cited by the judge as supporting application of the clear and unmistakable waiver standard, arose in an entirely different context. In that case, the issue presented concerned the employer's imposition of more severe discipline upon union officers, than upon other employees, for their participation in a strike that was in breach of a contractual no-strike clause. The employer defended on the ground that the contract imposed a greater obligation on union officers to prevent unlawful strikes and that the Union had effectively waived the officers' statutory right to be free from discrimination. The Court rejected the Union's argument that this particular statutory right could never be waived, observing that the Act distinguished between rights of an economic nature and those that involved freedom of choice. "Thus, a union may bargain away its members' economic rights, but it may not surrender rights that impair the employees' choice of their bargaining representative." *Id.* at 706. Because the purported waiver of rights in issue had no impact on the employees' right to choose their representative, the Court concluded that the right was one that could be waived. Nevertheless, the Court held that while a waiver of statutory rights need not be "express" and could be "implied," *Id.* at 708 n. 12, "the waiver must be clear and unmistakable," and would not be inferred "from a general contractual provision." *Id.* at 708.

[9] Similarly, the judge's reliance upon *NLRB v. C&C Plywood,* 385 U.S. 421 (1967) is misplaced. *C&C Plywood* merely held that the Board possessed jurisdiction (albeit neither exclusive nor primary) to interpret collective bargaining agreements where necessary to adjudicate unfair labor practice charges. The case had nothing at all to do with waiver.

Metropolitan Edison involved a union's right to waive the statutory rights of *individuals* whom the union represented. The Act "contemplates that individual rights may be waived by the union so long as the union does not breach its duty of good-faith representation." *Id.* at 706, n. 11. What *Metropolitan Edison* did not involve is a certified union's ability to waive its *own* statutory right to bargain on behalf of its members. Although employees have a section 7 right to "bargain through representatives of their own choosing," this right is collective in nature, not individual. Under § 9(a) of the Act, once a majority of employees in an appropriate unit designate a bargaining representative, the employees' individual bargaining rights are extinguished and the designated union becomes the employees' exclusive representative "for the purposes of collective bargaining." Both the right and the duty to bargain belong to the designated bargaining representative, not individual employees. 29 U.S.C. § 158(d).

The clear and unmistakable waiver standard is perfectly sensible when a union is alleged to have bargained away individual member rights. Its application to a union's right to bargain, particularly when the parties have agreed to a collective bargaining agreement setting forth the rights and obligations of all parties, seems elusive at best. Although the duty to bargain in good faith does not cease with the reaching of a contract, the duty is undeniably limited by the terms of the agreement. Neither party may be compelled "to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before the terms and conditions can be reopened under the provisions of the contract." 29 U.S.C. § 158(d). "A collective bargaining agreement is an effort to erect a system of industrial self-government." *USWA v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960). "It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate." *Id.* at 578. "The processing of disputes through the grievance

machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement." *Id.* at 581.

Thus, while circumstances may arise during the term of a contract that were unforeseen by the parties and where bargaining may be required, mid-term bargaining is the exception, not the rule. And when an employer acts pursuant to a claim of contractual right, the question is one of interpretation that "has nothing interesting to do with the doctrine of waiver." *Chicago Tribune Co. v. NLRB,* 974 F.2d 933, 937 (7th Cir. 1992). "A waiver occurs when a union knowingly and voluntarily *relinquishes* its right to bargain about a matter; but where the matter is covered by the collective bargaining agreement, the union *has exercised* its bargaining right and the question of waiver is irrelevant." *Department of the Navy, Marine Corps Logistics Base v. FLRA,* 962 F.2d 48, 57 (D.C. Cir. 1992) (Emphasis included). "Unions employ experienced contract negotiators, who do not need special rules of construction to protect them from being outwitted by company negotiators." *Chicago Tribune,* 974 F.2d at 937.

Under the contract coverage doctrine, the Board need only look to see whether the contract plausibly covers the dispute. If it does—because arbitrators and courts, not the Board, are the primary authorities with respect to matters of contract interpretation—the Board should "stay its hand rather than spend public funds on an unfair labor practice proceeding unlikely to provide the union with any greater relief than it could obtain from an arbitrator." *Id.* at 938. "Of course, if an employer adopts an unreasonable interpretation of an agreement in order to evade its duty to bargain collectively, the Board has a reason to intervene." *Id.*

Under the contract coverage analysis, the complaint allegation that Huber unlawfully implemented a revised attendance policy is easily dismissed. The CBA expressly authorizes Huber "to adopt reasonable rules and policies subject to at least seven (7) days' notice prior to

implementation of such rule or policy to provide the Union with the opportunity for input during that time and subject to the Union's right to promptly grieve the reasonableness of any such rule or policy." The Union was given far more than seven days' advance notice. It had multiple opportunities to provide input, which it pursued, and which input was considered by Respondent. Further, the Union retained the right to grieve the reasonableness of the rule.

This situation is in many respects similar to *Chicago Tribune, supra,* where the contract granted the company the exclusive right "to establish and enforce reasonable rules and regulations relating to the operation of its facilities and to employee conduct." 974 F.2d at 935. Relying upon this contractual provision, the company implemented a drug and alcohol policy. Because the drug and alcohol policy clearly related to employee conduct, and the Union could have grieved the reasonableness of the policy, the court concluded that there was no violation of § 8(a)(5). For the same reasons, the allegation in this case should be dismissed.

CONCLUSION

In their collective bargaining agreement, Respondent and the Union agreed to a specific procedure to be followed in the event that Respondent wished to implement new or revised policies and rules. Respondent fully complied with that procedure, met with the Union multiple times to receive input, and considered that input before implementing a revised attendance policy. Whether viewed as compliance with contractual procedures, waiver of further bargaining rights, or as being fully covered by the contract, Respondent did not violate § 8(a)(5) of the Act. Respondent requests that the Consolidated Complaint be dismissed in its entirety.

Dated this 16th day of March 2018

/s/ Charles P. Roberts III

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CERTIFICATE OF SERVICE

I certify that this day, March 16, 2018, I served the foregoing BRIEF IN SUPPORT OF EXCEPTIONS on the following parties of record in the manner indicated below:

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